

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1124

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH S. WILLIAMS,
Defendant-Appellant.

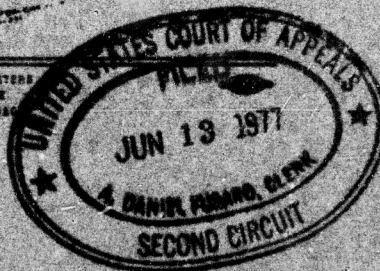
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Plaintiff-Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

THEODORE J. BURNS,
Assistant United States Attorney,
of Counsel.

NATVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
80 CENTER ST., NATVIA, N. Y. 14240
716-848-0487





INDEX.

	Page
Preliminary Statement	1
Statutes Involved	2
Statement of the Case	3
Argument:	
Point I. The defendant was properly questioned about two prior felony convictions.....	5
Point II. Consistency in verdicts is not required ..	9
Point III. The jury's verdicts are not inconsistent .	10
Conclusion	12

TABLE OF CASES.

Bartchy v. United States, 319 U.S. 484 (1943)	10
Hamling v. United States, 418 U.S. 87 (1974)	9
U.S. v. DeSena, 490 F.2d 692 (2nd Cir. 197)	5
U.S. v. Harrington, 490 F.2d 487 (2nd Cir. 197)	5
United States v. Apuzzo, Docket No. 77-1015, Slip Op. 3347 (2nd Cir., Decided May 5, 1977).....	8
United States v. Bethea, 483 F.2d 1024 (4th Cir. 1973)	9
United States v. Fiorella, 468 F.2d 688 (2nd Cir. 1972)	9
United States v. Hawley, Docket No. 76-1469, Slip Op. 3239 (2nd Cir., Decided April 27, 1977).....	8
United States v. Hayes, Docket No. 3123 (2nd Cir., Decided April 21, 1977)	8
United States v. Zane, 495 F.2d 683 (2nd Cir. 1974)..	9

II.

STATUTE.

	Page
Title 18, United States Code:	
Section 495	2,10
Section 1708	2

RULES.

Rule 609(a) of the Federal Rules of Criminal Pro- cedure	6,7,8
---	-------

IN THE
United States Court of Appeals

For the Second Circuit

77-1124

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH S. WILLIAMS,
Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

Joseph Williams was tried on two count indictment charging him with possession of stolen mail (Count I), and uttering and publishing a U. S. Treasury check with a forged endorsement (Count II). After a trial by jury before John T. Curtin, Chief Judge of the United States District Court for the Western District of New York, the defendant was convicted of the uttering and publishing count but acquitted of the possession of stolen mail count. Judge Curtin sentenced the defendant to eighteen months imprisonment.

The defendant now appeals, alleging that the Court improperly permitted cross-examination of the defendant on his prior felony convictions and that the jury's verdicts were inconsistent.

Statutes Involved

Count I charged Williams with possession of stolen mail in violation of Title 18, United States Code, Section 1708 which provides in pertinent part as follows:

Whoever steals, takes, or abstracts . . . from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter . . . ; or . . .

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Count II charged the defendant with a violation of Title 18, United States Code, Section 495 which provides in pertinent part as follows:

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officer or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited . . .

Shall be fined not more than \$1,000 or imprisoned not more than ten years, or both.

Statement of the Case

On May 14, 1976, a U. S. Treasury check in the amount of \$382.55 was mailed to Elar Parker at his residence at 1650 Genesee Street in Buffalo, New York (Transcript of Trial Proceedings 48). At that time Mr. Parker was expecting to receive a federal income tax refund check for approximately that amount (Tr 32). He never received the check, nor did he ever give anyone permission to endorse any such check on his behalf (Tr 54). He was living in an apartment house in Buffalo where Irene Benson also resided (Tr 53).

Irene Benson testified that she saw several men, including the defendant but not Parker, standing beside Parker's mailbox at the Genesee Street address on May 15, 1976. She heard the men discussing plans to cash a check which they found in Parker's mailbox at the Riverside Men's Shop (Tr 130-132). Later that day, the men offered her \$10.00 to remain silent about what she had seen and heard (Tr 134). She refused and later told Mr. Parker about the incident (Tr 135). A few days later, she selected the photograph of the defendant from a spread of pictures shown her by Detective Chester Shear as one of the individuals who she saw and heard discussing the cashing of the check (Tr 139-142, 192-196). She knew the individual's first name was "Joe", but did not know his last name (Tr 136-137).

James Ridgeway, Irene Benson's brother, testified and admitted that he was one of the individuals with the defendant on May 15, 1976 at his sister's residence. However, he said that it was his sister who took the check from the mailbox, and the first discussion relating to the check took place in her apartment, not at Parker's mailbox (Tr 249). He said the

defendant, whom Ridgeway had known previously, came to the apartment shortly thereafter with another man. The three men, including Williams, then left the apartment with the check and drove to the Riverside Men's Shop. Williams went into the store and returned a few minutes later with money which was then split among the three men (Tr 250-253).

Richard Wells, a sales clerk at the Riverside Men's Shop, testified that a man identifying himself as Elar Parker purchased a suit from his store on May 15, 1976 and presented a U. S. Treasury check in the amount of \$382.55, payable to Elar Parker, to pay for the clothing (Tr 67-69). The man endorsed the check in Mr. Wells' presence (Tr 68). Neil Ehrenreich, the owner of the store, also saw the man that day and the check he presented (Tr 93). Patricia Grace, an employee of the store, saw and spoke to the man two days later when he returned and asked for a refund (Tr 108-109).

After receiving a complaint from Elar Parker, Detective Chester Shear interviewed Irene Benson and the Riverside Men's Shop employees. He displayed the same spread of seven police photographs to Benson, Wells, Ehrenreich and Grace. Most, if not all, of the photos were of different individuals named Joseph Williams, since Benson had told Detective Shear that she believed the name of one of the persons with the check was Joseph Williams (Tr 223). All four persons selected the photograph of the defendant as the person seen with the check, either at 1650 Genesee Street or at the Riverside Men's Shop (Tr 195-196, 197-198, and 200-202).

Benson, Wells, Ehrenreich and Grace all testified at trial that they had identified the defendant's photograph (Tr 73-74, 96-97, 115-116, and 139-141). Benson, Ridgeway and Grace made in-court identifications of the defendant, ap-

proximately seventeen months after the offense (Tr 113, 131-132 and 250).¹

The defendant testified that he was not at Irene Benson's house at anytime on May 15, nor did he possess or cash the check in question. Instead, he said he was with a friend, Robert Pitts, all day. Pitts testified in support of the defendant's alibi.

POINT I

The defendant was properly questioned about two prior felony convictions.

The defendant testified at trial and denied cashing the check which was the subject of the indictment. He claimed he was with a friend the entire day and knew nothing about Parker's check. On cross-examination, he admitted that he had two prior felony convictions within the previous ten years. The first conviction was in May 1968 on his plea of guilty to attempted forgery for which he received a two and one-half to five year jail sentence (Government's Appendix 11). The second felony conviction was in June 1975 on his plea of guilty before Judge Curtin to possession of a U. S. Treasury check which had been stolen from the mail, an of-

¹ No motions were made before or at trial regarding the photographic identifications, although the defendant was advised of the identifications during pre-trial discovery proceedings. See paragraph 3, Government's Response to Oral Requests for Discovery.

Also, Judge Curtin was aware of this Court's decisions in *U.S. v. Harrington*, 490 F.2d 487 (2nd Cir. 197), and *U.S. v. DeSena*, 490 F.2d 692 (2nd Cir. 197), regarding the propriety of allowing the jury to view police mug shots of the defendant (Tr 164). The photographs were admitted in evidence without objection of the defendant (Tr 268, 274, and 317-321).

fense punishable by a maximum imprisonment term of five years.²

Before calling his client as a witness, the defendant's attorney asked the Court to restrict any questioning by the prosecutor regarding any prior convictions. Judge Curtin refused, and ruled that any such questions would be permissible under Rule 609(a) of the Federal Rules of Criminal Procedure.

Rule 609(a) provides as follows:

General rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

There are two bases upon which Judge Curtin could properly rule that the defendant's prior felony convictions

² The circumstances surrounding the defendant's plea of guilty to possession of stolen mail were similar to the facts in this case. The defendant was originally charged in a four count indictment alleging possession of two U. S. Treasury checks stolen from the mail and uttering and publishing the checks with forged endorsements. When he pleaded guilty to one count of possession of stolen mail before Judge Curtin in May 1975, the defendant was represented by the same attorney who represented him at the trial of this case. Although the details of the plea are not part of the Record on Appeal, they may be found in the file of the Clerk of the U. S. District Court for the Western District of New York in CR. 75-34. Since plea and sentence were before Judge Curtin, it can be safely presumed that he was aware of the underlying circumstances of this prior conviction.

were admissible: 1) The offense was punishable for a term of imprisonment in excess of one year and the probative value of the evidence outweighed the prejudicial effect to the defendant; or 2) the offense involved dishonesty or false statement. On the basis of the evidence before him, Judge Curtin correctly found that the defendant's credibility could be impeached by evidence of both convictions.

The defendant does not dispute that both convictions were punishable by terms of imprisonment in excess of one year, as required by subsection (1) of Rule 609(a). However, he contends that the Court erred in finding that "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant."

The same argument was presented to Judge Curtin before the defendant testified (Gov't. App. 13-14). Judge Curtin found that the defendant could be questioned about these convictions, despite the defense argument that the prejudice to the defendant outweighed the probative value of the felony convictions. Although Judge Curtin did not make detailed findings regarding the basis for his rulings on this point, it is clear that he was aware of the provisions in subsection (1) of Rule 609(a) and implicitly determined that the probative value of the convictions outweighed any prejudice (Gov't. App. 8-9, 13-16).

The Court's rulings are supported by the record in this case. Indeed, the defendant did not call the Court's attention to any specific prejudice to the defendant, other than arguing that the prior felony convictions were for offenses similar to the charges on which he was being tried (Gov't. App. 12-13). However, the prior convictions were clearly probative of the defendant's credibility where the defendant flatly denied any involvement with the cashing of the stolen check, thereby

making his credibility an essential issue at the trial. *United States v. Hawley*, Docket No. 76-1469, Slip Op. 3239, n.5 3245-3246 (2nd Cir., Decided April 27, 1977). Moreover, the convictions were not for offenses which might unduly inflame or prejudice the jury against the defendant for reasons unrelated to the defendant's veracity.

Furthermore, in addition to permitting the questions under subsection (1), Judge Curtin clearly stated, and the defendant agreed, that both convictions involved dishonesty:

The Court: They both have to do with the question of honesty.

Mr. Allen: Absolutely.

The Court: And the weighing of the credibility of the witness . . . (Gov't. App. 14).

In effect, the defendant admitted that the convictions were admissible under subsection (2) of Rule 609(a) since they "involved dishonesty or a false statement". Since the convictions involved attempted forgery and possession of a stolen U. S. Treasury check, he could hardly do otherwise. See *United States v. Apuzzo*, Docket No. 77-1015, Slip Op. 3347, 3349 (2nd Cir. Decided May 5, 1977); and *United States v. Hayes*, Docket No. 3123, 3126-3127 (2nd Cir., Decided April 21, 1977).

Finally, the defense strategy in this case was to admit that the defendant had a criminal record and to permit questioning of the defendant regarding his record (Gov't. App. 13-14). The strategy was designed to persuade the jury that the defendant had always pleaded guilty in the past but had chosen to stand trial in this case to demonstrate his innocence of the offenses charged (Gov't. App. 23-24). Under these circumstances, where the defendant readily admitted details of his criminal record, he should not be permitted to

pick and choose only those convictions which he believed the jury should learn about.

No undue or improper emphasis was placed on the defendant's prior convictions during the prosecutor's summation. In fact, both the Court and the prosecutor stressed that the convictions should be considered by the jury only in evaluating whether the defendant was a believable witness (Gov't. App. 21-22). Judge Curtin underscored the limited purpose for which he was admitting the evidence in comments made to the jury during the prosecutor's summation and in his instructions to the jury (Gov't. App. 21 and 37).

POINT II

Consistency in verdicts is not required.

Jury verdicts need not be consistent. *Hamling v. United States*, 418 U.S. 87, 100-101 (1974). Indeed, this Court has held that plainly inconsistent jury verdicts simultaneously rendered are a jury's prerogative. *United States v. Zane*, 495 F.2d 683, 690-691 (2nd Cir. 1974), and *United States v. Fiorella*, 468 F.2d 688, 690 (2nd Cir. 1972).

United States v. Bethea, 483 F.2d 1024 (4th Cir. 1973), cited by the defendant, may be readily distinguished. *Bethea* involved a Selective Service prosecution where the defendant was charged with failing to report for induction, failing to keep his draft board advised of his current address, and failing to report for a physical examination. The defendant was convicted on all counts. The Fourth Circuit Court of Appeals found the verdicts to be "contradictory" since, to convict the defendant of failing to report for the physical examination and for induction, the jury must have found that the defendant had actual notice of the orders to report. If the

defendant did have actual notice, he could not be found guilty of failing to keep his local board advised of his current address. *Bartchy v. United States*, 319 U.S. 484 (1943). Since the registrant's "guilt or innocence on all counts depended upon the jury's resolution of one factual question" the Court of Appeals found that his conviction on all three counts was not logically possible.

Williams' situation is quite different, since his guilt or innocence on both counts did not depend entirely upon the jury's resolution of one factual question. His conviction on the uttering and publishing count and acquittal on the possession of stolen mail count are logically possible since the elements of the offense are different.

POINT III

The jury's verdicts are not inconsistent.

To establish that the defendant unlawfully possessed stolen mail, the Government had the burden of proving beyond a reasonable doubt that the U. S. Treasury check described in Count I was in fact stolen from the mail, that the defendant possessed the check after it had been stolen from the mail, and that the defendant knew that the check had been stolen from the mail. The Court carefully instructed the jury that the Government must prove beyond a reasonable doubt that the defendant knew the check was stolen from the mail (Government's Appendix 39).

Although the uttering and publishing count involved the same check, the elements of a Section 495 offense are different. To establish the offense charged in Count II, the Government had the burden of proving beyond a reasonable doubt that the defendant placed or offered to place in cir-

culatation the check described in the indictment, that the defendant did so with knowledge that the payee's endorsement was forged, and that the defendant acted willfully and with intent to defraud the United States.

The jury apparently was not satisfied beyond a reasonable doubt that the defendant actually knew, or should have known, that the check was stolen from the mails. Indeed, there was no evidence that the defendant actually took the check from Parker's mailbox. Furthermore, the two witnesses present at 1650 Genesee Street when there was a discussion about cashing the check disagreed as to where the conversation took place. Irene Benson said that she saw Williams standing next to Parker's mailbox with the check. Ridgeway said that his sister, Irene Benson, had stolen the check, and the conversation with Williams about cashing it took place in her apartment after his sister had stolen the check.

Therefore, since there was a discrepancy between these two witnesses regarding the place where Williams first came upon the check, the jury most likely chose not to believe either of the witnesses and resolved this factual dispute by acquitting the defendant of possession of the check with knowledge that it was stolen from the mail.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Plaintiff-Appellee,
Office and Post Office Address,
502 United States Courthouse,
Buffalo, New York 14202.

Theodore J. Burns,
Assistant United States Attorney,
of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A.

vs

Joseph S. Williams

State of New York)
County of Genesee) ss.:
City of Batavia)

Leslie R. Johnson

I, _____ being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 10th day of June, 1977
I mailed _____ copies of a printed Appellee in Appendix & Brief
the above case, in a sealed, postpaid wrapper, to:

10 copies by Air Mail to: A. Daniel Fusaro, Clerk
United States Court of Appeals Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: James F. Allen, Esq.
1260 Delaware Avenue
Buffalo, New York 14209

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney, Att: Theodore J. Burns, Assistant
U.S. Attorney

502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

10th day of June, 1977

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977